

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

RICARDO LUNA,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of the Social Security
Administration,

Defendant.

CASE NO. 2:15-cv-01278 JRC

ORDER ON PLAINTIFF'S
COMPLAINT

This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S. Magistrate Judge and Consent Form, Dkt. 3; Consent to Proceed Before a United States Magistrate Judge, Dkt. 4). Plaintiff has filed an Opening brief, to which defendant has responded (*see* Dkt. 10, 11).

After considering and reviewing the record, the Court concludes that the ALJ did not err by failing to develop the record. There is no objective evidence in the record to

1 substantiate the allegation of a 100% VA disability rating, and plaintiff's equivocal
2 testimony at the hearing did not render the record ambiguous regarding this allegation.
3 Furthermore, the ALJ noted and discussed the 90% VA disability rating, and discussed
4 various other aspects of the record substantiating the ALJ's finding that insufficient
5 evidence in the record demonstrated this level of disability.

6 Therefore, this matter is affirmed pursuant to sentence four of 42 U.S.C. § 405(g).

7 BACKGROUND

8 Plaintiff, RICARDO LUNA, was born in 1965 and was 44 years old on the alleged
9 date of disability onset of April 15, 2010 (*see* AR. 185-86, 202-03). Plaintiff was a
10 paratrooper in the military (AR. 30) and his other work history consists of fabricator
11 helper for a heating and cooling vendor, retail sales worker and utility worker (AR. 233-
12 42). Plaintiff was last employed as a salesperson at Home Depot but that ended due to
13 conflicts with other employees and customers (AR. 31-32).

14 According to the ALJ, plaintiff has at least the severe impairments of "Post
15 traumatic stress disorder (PTSD); [and] anxiety disorder (20 CFR 404.1520(c))" (AR.
16 12).

17 At the time of the hearing, plaintiff was living with his 9-year-old son (AR. 29).

18 PROCEDURAL HISTORY

19 Plaintiff's application for disability insurance ("DIB") benefits pursuant to 42
20 U.S.C. § 423 (Title II) of the Social Security Act was denied initially and following
21 reconsideration (*see* AR. 62-73, 75-86, 88-96, 98-106). Plaintiff's requested hearing was
22 held before Administrative Law Judge Glen G. Meyers ("the ALJ") on December 17,
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1 2013 (*see* AR. 24-60). On January 31, 2014, the ALJ issued a written decision in which
 2 he concluded that plaintiff was not disabled pursuant to the Social Security Act (*see* AR.
 3 7-23).

4 In plaintiff's Opening Brief, plaintiff raises the following issue: (1) Whether or
 5 not the Commissioner erred by failing to develop the evidentiary record properly (*see*
 6 Dkt. 10, p. 1).

7 STANDARD OF REVIEW

8 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's
 9 denial of social security benefits if the ALJ's findings are based on legal error or not
 10 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d
 11 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
 12 1999)).

13 DISCUSSION

14 **Did the Commissioner err by failing to develop the evidentiary record**
 15 **properly?**

16 The ALJ "has an independent 'duty to fully and fairly develop the record and to
 17 assure that the claimant's interests are considered.'" *Tonapetyan v. Halter*, 242 F.3d
 18 1144, 1150 (9th Cir. 2001) (*quoting Smolen v. Chater*, 80 F.3d 1273, 1288 (9th Cir.
 19 1996) (*quoting Brown v. Heckler*, 713 F.2d 411, 443 (9th Cir. 1983) (per curiam))). The
 20 ALJ's "duty exists even when the claimant is represented by counsel." *Brown, supra*, 713
 21 F.2d at 443 (*citing Driggins v. Harris*, 657 F.2d 187, 188 (8th Cir. 1981)). However, the
 22 ALJ's duty to supplement the record is triggered only if there is ambiguous evidence or if
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1 the record is inadequate to allow for proper evaluation of the evidence. *Mayes v.*
2 *Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001); *Tonapetyan v. Halter*, 242 F.3d 1144,
3 1150 (9th Cir. 2001) (*citing Smolen, supra*, 80 F.3d at 1288 (other citation omitted)).

4 Plaintiff contends that the ALJ failed to develop the record fully because “there is
5 evidence that plaintiff received a disability rating of 100% from the Veterans
6 Administration [“VA”]” (Dkt. 10, p. 3 (*citing* AR. 308)). However, the only evidence of a
7 100% disability from the VA cited by plaintiff entails plaintiff’s theoretical discussion
8 with a therapist regarding what benefits would result from a 100 percent disability
9 finding from the VA (*see* Dkt. 10, p. 3 (*citing* AR. 308)). The therapy progress note
10 indicates that “Client Report / Topics of Session” included “100% disability =
11 \$3000/monthly income and he could get a part-time job” (AR. 308). Because the progress
12 note indicates that with this 100% disability, plaintiff also “could” get a part-time job,
13 this suggests that this was a discussion of a hypothetical situation that did not exist at the
14 time (*see id.*). Furthermore, as argued by defendant, in the cited progress note, plaintiff
15 simply was describing his plans to reopen his VA claim for an increase to 100%
16 disability, a finding which is buttressed by a subsequent progress report which indicated
17 that plaintiff ““will be applying for 100% disability”” (Dkt. 11, p. 4 (*quoting* AR. 307)).
18 The Court finds defendant’s argument to be persuasive and her characterization of the
19 record to be accurate (*see* AR. 307-08). Plaintiff did not file a reply to challenge this
20 argument or characterization of the record. Even if this progress note represented an
21 actual allegation of a contemporaneous circumstance, it still only reflected plaintiff’s
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1 allegation of such (*see id.*). The Court notes that the ALJ failed to credit fully plaintiff's
2 credibility, a finding that was not challenged by plaintiff (AR. 16).

3 In addition, as noted by defendant in her responsive brief, when the ALJ
4 questioned plaintiff about evidence in the record that described a 90% VA disability
5 rating, plaintiff "testified equivocally that he believed he had a VA disability rating of
6 100%" (Dkt. 11, p. 3 (*citing* AR. 40)). Again, as noted, plaintiff did not file a reply to this
7 characterization by defendant. Plaintiff's response at the hearing included the following
8 testimony:
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10 Well, first off, it's -- and, believe me, when it comes to these forms, I get
11 confused. It was explained to me that I am at 100%. I have another form
12 that got sent to me -- I, I wish I had brought it -- that shows me a 100%.
13 Because I also have hearing problems, which -- because of all -- being
around automatic fire and armored vehicles and planes, it's understandable.
To be honest, I, I'm still -- I don't understand all these things, that I just do
. . . ."

14 (AR. 40). Plaintiff did not submit any further documentation regarding any 100%
15 disability rating.

16 For the reasons stated, the Court concludes that the record does not contain any
17 objective evidence regarding a 100% VA disability rating, and allegations by plaintiff of
18 such a rating entail a future hypothetical scenario, and equivocal evidence and confusion
19 regarding such rating. The Court concludes that the ALJ did not err in his duty to develop
20 the record regarding any 100% VA disability rating.

21 In addition, the Court finds persuasive defendant's argument that there could not
22 have been any error because the ALJ considered and discussed the VA disability rating
23 that is in the record (Dkt. 11, pp. 2, 3, 4-5, 6-7). Defendant contends that the ALJ
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1 considered the VA disability rating of 90%, considered other evidence in the record that
2 was not available to the VA, and gave specific, persuasive and valid reasons for failing to
3 credit fully the VA 90% disability rating (*see id.* at 6-7).

4 Regarding the weight to be given to a disability determination by the VA, the
5 Ninth Circuit has agreed “with the approach of the Fourth, Fifth, and Eleventh Circuits
6 and h[e]ld that in an SSD case an ALJ must ordinarily give great weight to a VA
7 determination of disability . . . because of the marked similarity between these two
8 federal disability programs.” *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir.
9 2002) (internal citations omitted). The court further concluded that “the ALJ may give
10 less weight to a VA disability rating if he gives persuasive, specific, valid reasons for
11 doing so that are supported by the record.” *Id.* (citation omitted).

13 Here, the ALJ provided two reasons for failing to credit fully “the rating from the
14 Veterans Administration that the claimant is 90% disabled, with 70% of that disability
15 stemming from his PTSD” (AR. 17 (*citing* AR. 480)). First, the ALJ noted that the VA
16 did not provide any rationale for the findings (*id.* (*citing* AR. 480)). This finding by the
17 ALJ is based on substantial evidence in the record as a whole. Even if this finding by the
18 ALJ is not sufficient to support the “little weight” to the rating from the VA, the ALJ also
19 found that there was insufficient evidence in the record to demonstrate that plaintiff has
20 this level of disability (AR. 17). Defendant argues that this rationale is persuasive,
21 specific, and valid, in the context of the ALJ’s written decision, because the ALJ here,
22 similar to the situation presented in a Ninth Circuit case, “similarly considered evidence
23 not considered by the VA, including evidence that undermines the credibility of
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1 plaintiff's allegations; State agency psychiatric and psychological consultants' opinions
2 indicating he could perform work tasks not requiring frequent interactions with the
3 public; and vocational expert's testimony describing his ability to perform jobs existing
4 in significant numbers in the national economy" (Dkt. 11, pp. 6-7 (*citing Valentine v.*
5 *Comm'r Soc. Sec. Admin.*, 574 F.3d 685, 695 (9th Cir. 2009)). Defendant's argument is
6 persuasive.

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8 For example, after finding that the objective medical evidence was inconsistent
9 with plaintiff's allegations of limitations, the ALJ found that the "record contains several
10 other inconsistencies that further reduce the claimant's credibility" (AR. 16). The ALJ
11 indicated that this finding was based in part on evidence in the record that even though
12 plaintiff alleged that he suffered from disabling limitations as a result of his PTSD and
13 other mental conditions following his discharge from the military, plaintiff worked at
14 both Best Buy and Home Depot for four years at each business after his discharge (*see*
15 *id.*). As found by the ALJ, the "evidentiary record does not explain how the claimant
16 managed to maintain his employment for such a significant period of time while being
17 affected by severe mental conditions at the same time" (*see id.*).

18 The ALJ also discussed how various activities conducted by plaintiff were
19 inconsistent with plaintiff's allegation of social and other mental limitations:

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21 For example: (1) the claimant is the primary caretaker of his young son,
22 who has his own mental conditions; (2) the claimant traveled to
23 California with his son in 2012 by air, on a trip that included significant
24 contact with the public in airports in spite of his mental condition; (3) in
2011, the claimant volunteered in homeless camps and Native American
reservations in spite of his mental condition; (4) has a personal trainer
and exercises at a personal fitness center; (5) he drives his truck to

1 remote areas to hike; (6) writes, and has a future goal of writing a
2 children's book (internal citations omitted). I further note that although
3 the Veterans Administration (VA) rates the claimant's disability at 90%
4 total and his PTSD is 70%, there is no support for these ratings in the
5 evidence contained in this record (internal citation to AR. 480).

6 (AR. 16).

7 The ALJ also discussed and gave significant weight to state agency opinions that
8 plaintiff was not mentally disabled, with a finding that "this is credible [and] consistent
9 with the longitudinal record and [plaintiff's] daily activities" (AR. 17 (*citing* AR. 88-96,
10 98-106)). The ALJ specified that, as "outlined above, the claimant is largely normal on
11 mental status examination [and] both his social functioning as well as his concentration,
12 persistence and pace comport with these findings as discussed" (AR. 17 (citations
13 omitted)). Although the state agency doctors opined that plaintiff suffered from some
14 moderate limitations, such as in his ability to interact with the public, they both
15 concluded that plaintiff's limitations did not render him unable to work pursuant to the
16 Social Security guidelines (*see* AR. 96, 105). The ALJ formulated a residual functional
17 capacity ("RFC") based in large part on the opinions from the state agency doctors (AR.
18 15, 17). And, based on this RFC, the vocational expert ("VE") opined that numerous jobs
19 exist in the national economy that plaintiff could perform (AR. 18-19).

20 The situation presented in this matter is analogous to that presented in *Valentine*,
21 as argued by defendant. *See Valentine, supra*, 574 F.3d at 695 ("the ALJ was justified in
22 rejecting the VA's disability rating on the basis that she had evidence the VA did not,
23 which undermined the evidence the VA did have"). Because the ALJ discussed
24 persuasive evidence that undermined the 90% disability finding by the VA, the Court

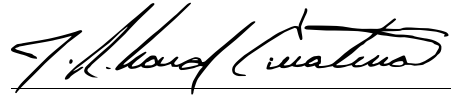
1 concludes that the ALJ provided specific, persuasive, and valid reasons for failing to
2 credit fully the 90% disability determination by the VA. *See id.*; *McCartey, supra*, 298
3 F.3d at 1076.

4 CONCLUSION

5 Based on the stated reasons and the relevant record, the Court **ORDERS** that this
6 matter be **AFFIRMED** pursuant to sentence four of 42 U.S.C. § 405(g).

7 **JUDGMENT** should be for defendant and the case should be closed.

8 Dated this 1st day of March, 2016.

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11 J. Richard Creatura
12 United States Magistrate Judge
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